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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NATHAN J. SHERIDAN, Plaintiff, v. FLADEBOE VOLKSWAGEN, INC., Defendant, cross-defendant and Appellant; VOLKSWAGEN OF AMERICA, INC., Defendant, cross-complainant and Respondent.	G039816 (Super. Ct. No. 06CC09510) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Motion to dismiss appeal. Judgment affirmed with directions. Motion denied.

David B. Dimitruk for Defendant and Appellant.

Carroll, Burdick & McDonough, Michael P. Sweeney, S. P. Conboy and S. Mark Varney for Defendant and Respondent.

Defendant and cross-defendant Fladeboe Volkswagen, Inc. appeals from a summary judgment in favor of defendant and cross-complainant Volkswagen of America, Inc. (VW) against plaintiff Nathan J. Sheridan in an action for breach of express and implied warranty and violation of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.; Song-Beverly Act). Fladeboe contends that the court erred in finding VW met its initial burden to negate the causation element under the express warranty claim, arguing in part that its objections to VW's declarations should have been sustained, and that it raised a triable issue of fact as to causation. We agree Fladeboe raised a triable issue of material fact as to causation and the court's order granting summary judgment erroneously included a finding to the contrary. But, as both parties agree, the motion was properly granted on other grounds. Therefore, we affirm the judgment but order the trial court to modify the order by striking the provision as to causation.

VW filed a motion to dismiss the appeal on the grounds the appeal is premature because the notice was filed before the judgment was entered and Fladeboe has no standing to appeal. We disagree and deny the motion.

FACTS AND PROCEDURAL HISTORY

Sheridan leased a car from Fladeboe. While the car was being driven to Las Vegas it completely lost power and was towed to Findley Volkswagen. A mechanic at Findlay determined the problem was caused by an aftermarket audio visual system Fladeboe had installed in the car. On that basis VW denied warranty coverage to Sheridan. Fladeboe also refused to repair the car.

Sheridan sued VW and Fladeboe, asserting several claims. For purposes of this appeal, the only relevant causes of action are for breach of express and implied warranties in violation of the Song-Beverly Act and the Magnuson-Moss Warranty Federal Trade Commission Improvement Act (15 U.S.C. 2301 et seq.; Magnuson-Moss

Act). VW cross-complained against Fladeboe for indemnity, contribution, and breach of contract.

VW moved for summary judgment against Sheridan, asserting the implied indemnity claim was barred by the statute of limitations (Civ. Code, § 1791.1, subd. (c)); and the express warranty claim failed because Sheridan could not show at least two repair attempts to fix the car, as required by statute (Civ. Code, § 1793.2, subd. (d); *Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1208), and nothing covered by VW's express warranty had caused the breakdown.

Specifically, VW relied on the diagnosis by the technician at Findlay, Landon Kirsch, as to the cause of the car's problem. His declaration in support of the motion states that when the car was brought to Findley, he was unable to start or jump start it. In inspecting the car, he found three "blown" fuses, which were connected to the audio visual system. After replacing them and further testing the fuses, he started the car and drove it for several miles, finding it ran properly. He concluded installation of the audio visual system had caused the problem.

Among other things, Sheridan disputed the claim that the car had been repaired because the audio visual system still did not work. He also argued that based on declarations Fladeboe filed, there was a triable issue of fact as to the cause of the electrical failure.

Fladeboe opposed the motion on the issue of causation only. It filed a lengthy declaration of its service director, Brad Timms, who performed an inspection and diagnosis of the car. He also reviewed the declaration of Kirsch and his work order. He performed numerous tests on the vehicle, including the replaced fuses and the connecting wires. He concluded Kirsch's diagnosis of the problem was "absolutely wrong." Specifically he stated that the audio visual system "did not [cause] and could not have caused the vehicle to cease operating at any time," that the fuses described by Kirsch

were not "blown" but were in good working condition, and that the likely cause of the problem was improper connection of a navigation system.

The court granted the motion on all grounds. As to causation the order stated that VW met its burden to show the breakdown was not caused by anything covered by its express warranty. It went on to state that Sheridan and Fladeboe had failed to create a material issue of fact that the incident had been cause by a defect covered by VW's warranty and found that the "warranty did not apply."

Fladeboe moved for reconsideration on the basis of new evidence. It submitted another declaration of Timms who stated that new testing performed after the motion was granted showed a faulty alternator was the cause of the electrical failure. He declared that a test performed by plaintiff's expert had led him to conduct additional tests himself. He had not learned of the expert's test until a few days after the hearing on the motion. The court denied the motion on the ground there was insufficient evidence to show why Fladeboe could not have learned of the new evidence prior to the hearing on the motion.

The complaint and VW's cross-complaint against Fladeboe remain. Although Sheridan filed an appeal he has since dismissed it. Fladeboe challenges the judgment only on the basis it raised in the trial court, claiming that VW did not negate the element of causation; thus our decision does not deal with the other two grounds. Additional facts are set out in the discussion.

DISCUSSION

1. Motion to Dismiss

VW relies on two grounds for its motion to dismiss: the appeal was premature because it was taken from the order granting the motion, not from the

judgment; and Fladeboe has no standing because the summary judgment was not directed to Fladeboe and Fladeboe agreed it should be granted. We disagree.

VW is correct that the notice of appeal was filed before judgment was entered. The order granting summary judgment was entered on November 19, 2007. On January 23, 2008 Sheridan filed a notice of appeal and on February 11 Fladeboe filed a notice of cross-appeal. The judgment was not filed until April 14. But we may treat the appeal as if from the judgment and choose to do so. (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1407, fn. 2.)

We also determine that Fladeboe has standing to pursue this appeal. An appeal may be brought by any aggrieved party. (Code Civ. Proc., § 902.) "An aggrieved party must (1) be a party of record (2) whose rights or interests are directly and injuriously affected by the judgment. [Citation.]" (*Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1676.)

Here Fladeboe, a party of record, is aggrieved. The order granting summary judgment found that VW met its burden to show the breakdown of the car "was not caused by any defect or nonconformity covered by" its express warranty and that neither plaintiff nor Fladeboe raised a triable issue of material fact to counter that. The court went on to "find[] that the [VW] express . . . warranty did not apply."

VW has a cross-complaint pending against Fladeboe; Fladeboe is also still defending against Sheridan's complaint. The issue of causation is alive in the remaining portion of the case.

Code of Civil Procedure section 437c, subdivision (*l*) provides: "In actions which arise out of an injury to . . . property, if a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion." Judgment in favor of VW on the issue of causation would preclude Fladeboe from attempting to prove VW was

liable in defending against the complaint if plaintiff raised an objection to the evidence. Moreover, "'[a] person who would be bound by the doctrine of res judicata . . . is a party sufficiently aggrieved to entitle him to appeal.' [Citations.]" (*Tomassi v. Scarff* (2000) 85 Cal.App.4th 1053, 1058.) That Fladeboe purportedly does not challenge the judgment on other grounds on which VW prevailed does not defeat its standing to attack the finding as to causation.

2. Summary Judgment

A defendant moving for summary judgment bears the burden of demonstrating that one of the elements of the cause of action "cannot be established, or that there is a complete defense . . . ." (Code Civ. Proc., § 437c, subd. (p)(2); see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once sufficient evidence is produced to meet this burden, the burden shifts to the plaintiff to produce sufficient evidence to demonstrate that a triable issue of material fact exists. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) Fladeboe contends VW failed to meet its initial burden. Based on our independent review of the motion (*id*. at p. 860) we disagree.

The method VW used to meet this burden was to negate an essential element of Sheridan's express warranty claim (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334), that is, to present evidence that the purported cause of the electrical failure was not covered by its warranty. It filed the declaration of Kirsch, who had examined the car and determined the problem was faulty installation of the aftermarket audio visual system. The declaration of Eric Bjorlin, VW's product liaison engineer, stated that problems caused by that product were not covered by VW's warranty.

Fladeboe contends the declaration was objectionable because Kirsch did not sufficiently set out his qualifications, did not test for other possible causes, and failed to set out his reasoning or describe how the "blown" fuses caused the loss of power. It

also challenges the declaration of Bjorlin. It filed objections to both declarations, which the trial court denied for failure to comply with California Rules of Court, rule 3.1354(b). Contrary to Fladeboe's assertion, this was not based on untimeliness. The rule sets out the required format of the objections, which Fladeboe did not satisfy because he failed to quote the challenged statements. Because the objections were properly sustained, we cannot consider any argument as to the insufficiency of the declaration.

Fladeboe's assertion that VW had to "'conclusively negate'" every potential cause of the car's breakdown is not correct. "'The complaint measures the materiality of the facts tendered in a . . . challenge to the . . . cause of action.' [Citation.]" (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 65.) The complaint alleged the car's electrical system failed. It further alleged that VW determined that the cause was a faulty audio visual system. The complaint also pleaded that Fladeboe had the installer of the audio visual system test the car and it advised that was not the cause. Finally, it alleged that if Fladeboe could prove the audio visual system was not the cause, plaintiff should recover against VW.

Plaintiff raised no articulable cause of the electrical failure other than the audio visual system. To meet its initial burden, VW was not required to speculate as to other possible causes and then defeat them on summary judgment. (See *Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1817 [movant "need not address a missing element or . . . respond to assertions which are unintelligible or make out no recognizable legal claim"].)

Because VW met its initial burden, Fladeboe was then required to produce evidence showing a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) Fladeboe filed the declaration of Timms, which sufficiently challenged VW's evidence that the faulty installation of the audio visual system caused the breakdown. This created a triable issue of material fact as to causation. Thus the court's order granting summary

judgment incorrectly found that there was no triable issue that VW's express warranty covered the cause of the problem with the car.

But there were other unchallenged grounds supporting the judgment, i.e., that plaintiff did not comply with the requisite number of repair attempts to recover under the breach of express warranty claims under the Song-Beverly Act and Magnuson-Moss Act and that the breach of implied warranty cause of action was barred by the statute of limitations. Even if the court's reasoning as to causation is incorrect, we must affirm a summary judgment if it is correctly granted on another basis. (*Barkley v. City of Blue Lake* (1996) 47 Cal.App.4th 309, 313.) Thus, the court properly entered judgment in favor of VW.

Because of the improper finding as to causation, however, we direct the trial court to strike the language in the order that states Sheridan and Fladeboe failed to create a triable issue of material fact that the incident was caused by a defect or nonconformity covered by VW's express warranty and its finding that VW's express warranty did not apply.

DISPOSITION

The motion to dismiss the appeal is denied. The judgment is affirmed. On remand the trial court is directed to strike the language on p. 2 of its order granting VW's motion for summary judgment, filed November 19, 2007, that states that Sheridan and Fladeboe failed to create a triable issue of material fact that the incident was caused by a defect or nonconformity covered by VW's express warranty and that VW's express warranty did not apply. The notice of entry of order granting summary judgment

filed November 26, 2007 shall also be modified accordingly. Appellant is entitled to costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.